

(19)

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1926

No. 82

**THE DAVIS SEWING MACHINE COMPANY OF DELAWARE,
APPELLANT,**

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED APRIL 22, 1927

(31,071)

(31,071)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 381

THE DAVIS SEWING MACHINE COMPANY OF DELAWARE,
APPELLANT,

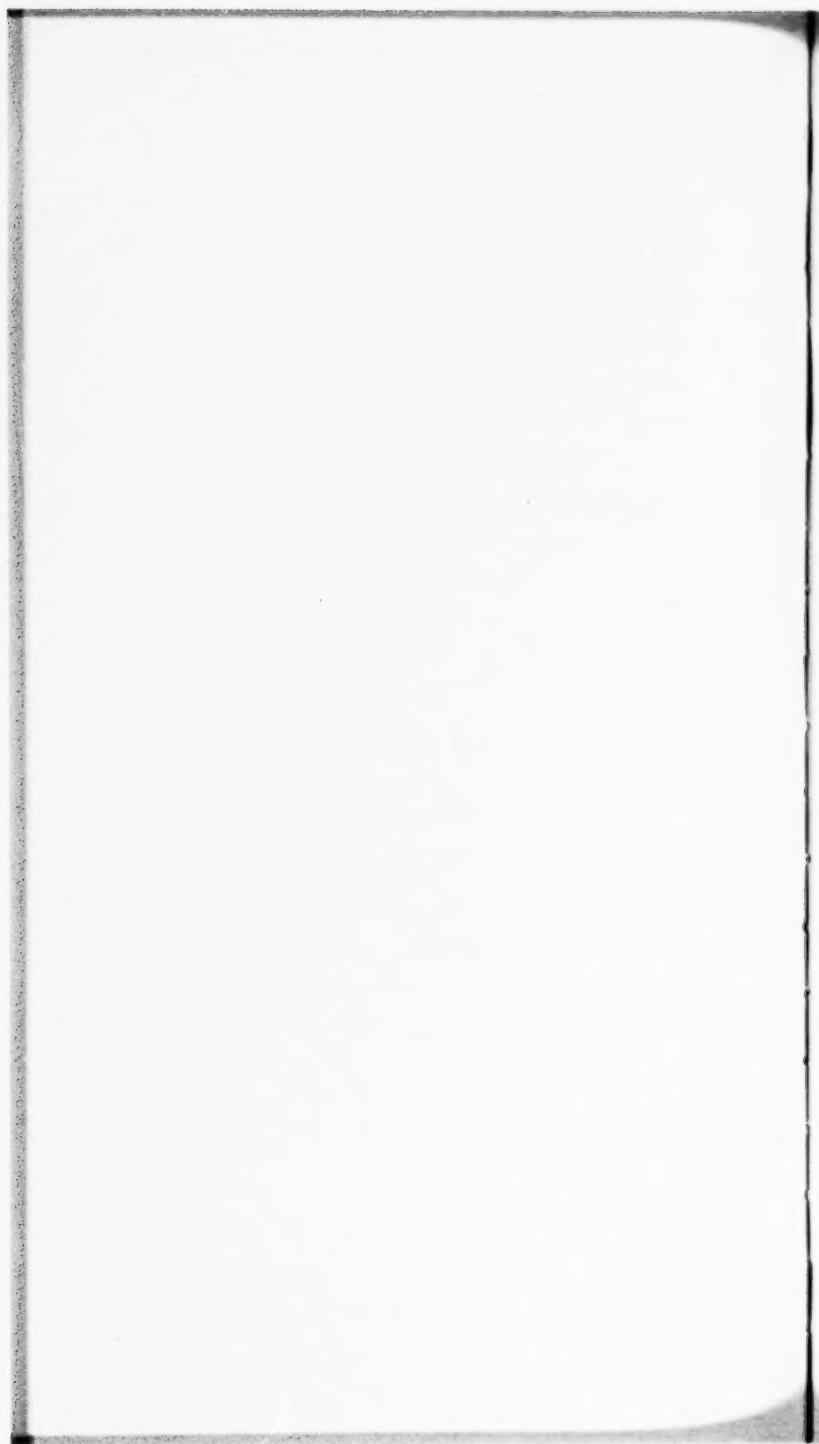
vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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[fol. 1]

IN COURT OF CLAIMS

No. B. 17

THE DAVIS SEWING MACHINE COMPANY OF DELAWARE

vs.

UNITED STATES

I. PETITION—Filed February 3, 1922

To the Honorable the Court of Claims:

The claimant, the Davis Sewing Machine Company of Delaware, having its principal office and place of business in the city of Dayton, state of Ohio, respectfully represents:

That the claimant is, and for a period long antedating all the matters and dates herein stated has been, a corporation organized and existing under the laws of the state of Delaware.

That on the fifth day of August, 1918, the National Tool and Manufacturing Company, a corporation organized and then existing under the laws of the state of Delaware, entered into a written contract with the United States, a copy of which said contract is [fol. 2] filed with this petition, said contract being No. P13030-2303TW, for the manufacture and delivery to the United States of 75,000 Very pistols, 25 m-m, marked IV, for the price of five dollars for each pistol f. o. b. cars, St. Louis, Mo., or \$375,000 for all of the pistols contracted for.

That the said contract called for commencement of delivery of said pistols September 1, 1918, and provided that delivery should continue at the rate of at least 12,500 pistols per month; all deliveries to be completed prior to March 1, 1919.

That in compliance with the terms of the said contract the United States furnished specifications and drawings for the manufacture of said pistols, and the said National Tool and Manufacturing Company was ready to begin the manufacture of said pistols on the fifth day of August, 1918; that on said fifth day of August, 1918, the said National Tool and Manufacturing Company received a telegram from the Ordnance Department of the United States calling for several changes in the drawings and specifications, which telegram was confirmed by letter on the eighth day of August, 1918; that on the ninth day of August, 1918, the said National Tool and Manufacturing Company telegraphed the Engineering Bureau of the War Department of the United States, calling attention to several discrepancies in the drawings, making it impossible to manufacture the pistols according to the drawings and asking that a representative of the bureau be sent to St. Louis; that in compliance with said request, Lieutenant Stern, representing the Engineering Bureau, came to St. Louis on the twelfth day of August, 1918, and an attempt was made to reconcile the conflict between various parts of the drawings;

that it was not until after the president of the said National Tool and [fol. 3] Manufacturing Company had made a special trip to Washington, D. C., and had there an interview with Lieutenant Colonel Ragsdale, of the Ordnance Department of the United States Army, then head of the Engineering, Trench Warfare Section, that proper adjustments were made and the various portions of said drawings reconciled and the discrepancies therein corrected; that the entire month of August, 1918 was consumed with these changes of the drawings and specifications, which resulted in substantial modifications being made in the engineering department of the said National Tool and Manufacturing Company and approved by Lieutenant Colonel Ragsdale on August 31, 1918; that on the twenty-eighth day of September, 1918, further changes were requested by the United States in the details of construction, calling for changes in the dimensions of the pistol hammer, which necessitated discarding all hammers theretofore constructed and making new tools for the purpose of manufacturing new parts called for by the modification; that on the fourth day of October, 1918, the National Tool and Manufacturing Company received notice from the United States of a change in the construction of the trigger, which necessitated new tools for the manufacture of the trigger, and discarding all triggers that had theretofore been manufactured; that on the fifth day of October, 1918, the said National Tool and Manufacturing Company was again notified by the United States that further changes must be made in the construction of the hammer, and again this part of the work had to be all started over anew.

That these constant changes in the specifications and drawings resulted in such delay that the said National Tool and Manufacturing Company was unable to make any deliveries; its organization was [fol. 4] demoralized and its plant stood partly idle; that while no one pistol was entirely completed, it was ascertained that at the time of the suspension of the contract, hereinafter referred to, upon the cessation of hostilities, the whole work of manufacture had been performed to the extent of sixty per cent, notwithstanding the delays and interruptions caused by the modifications by the United States, as aforesaid, of the drawings and specifications heretofore mentioned.

That on the eighteenth day of December, 1918, the United States, under provisions of the said contract for terminating the same in certain contingencies, notified the said National Tool and Manufacturing Company to discontinue work under said contract, and on said eighteenth day of December, 1918, the said National Tool and Manufacturing Company did discontinue work thereunder.

That the fair and reasonable value of all of the work done and performed by the said National Tool and Manufacturing Company under the terms and requirements of the said contract with the United States is \$225,000.

That on the twenty-first day of May, 1919, a partial payment settlement contract was entered into by and between the United States and the said National Tool and Manufacturing Company by which a payment of \$103,650.66 was made to the said National Tool and Manu-

facturing Company as an amount upon which both parties agreed as being due to the said National Tool and Manufacturing Company, but which said contract did not purport to be a settlement in full and which left the said National Tool and Manufacturing Company free to present its demands for the remainder of its claim; that the remainder or balance due the said National Tool and Manufacturing Company, after the payment to it of the said \$103,650.66, is \$121,349.34.

[fol. 5] That on the sixth day of November, 1918, there was created and constituted by the War Department of the United States (General Orders No. 103) a board of contract adjustment, to which board it was required that such claims as the one in question should be submitted for adjustment. That thereafter the said National Tool and Manufacturing Company presented its claim to the said board of contract adjustment, which board after full and complete hearings made an allowance, in addition to the \$103,650.66 agreed upon by the parties in the partial payment settlement contract above referred to, of the sum of \$14,192.25. That thereafter the said National Tool and Manufacturing Company appealed from said allowance to the appeal section of the War Department Claims Board, the same being case No. 150-C-2620, and the said appeal section of the War Department Claims Board affirmed the findings and allowance of the said board of contract adjustment, the opinion of the said appeal section being reported in Vol. 5, Decisions of War Department, page 287. That the said National Tool and Manufacturing Company did not accept the action of the said section as final, and has never received or accepted the said \$14,192.25 allowed by the said board of contract adjustment and affirmed by the said appeal section.

That on the *day* 10th day of May, 1919, the said National Tool and Manufacturing Company, under authority of the laws of the state of Delaware, changed its corporate name to that of the Blue Bird Manufacturing Company. That thereafter, on the 26th day of May, 1920, in the Circuit Court for the Eighth Judicial District of the State of Missouri, Division No. 2, the said Blue Bird Manufacturing Company was declared insolvent and a receiver was appointed to take charge of all of its property; that thereafter, on the [fol. 6] 30th day of June, 1920, at a sale of all the property and assets of the said Blue Bird Manufacturing Company by the said receiver, which sale was duly authorized by the said circuit court and thereafter approved by the said court, on July 15, 1920 the Davis Sewing Machine Company of Delaware, claimant herein, purchased among other assets of the said Blue Bird Manufacturing Company the claim against the United States herein set out and on which this claimant seeks to recover.

That the Davis Sewing Machine Company of Delaware, claimant herein, is the sole owner of this claim; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as herein stated; that this claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that this claimant and the said Na-

tional Tool and Manufacturing Company and the said Blue Bird Manufacturing Company have at all times borne true allegiance to the government of the United States, and have not in anyway voluntarily aided, abetted, or given encouragement to rebellion against the government of the United States; and that this claimant believes the facts as stated in this petition are true.

Wherefore, this claimant prays judgment of this court against the United States for the sum of \$121,349.34.

Frumberg & Russell, Attorneys for Claimant.

Sworn to by A. M. Frumberg jurat; omitted in printing.

[fol. 7]

EXHIBIT A TO PETITION

P13030-2303TW

This agreement made this fifth day of August, 1918, between National Tool and Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the state of Delaware and having an office at St. Louis, Mo., party of the first part, and the United States of America, by R. P. Lamont, Lieutenant Colonel Ordnance Department, United States Army, acting by direction of the Chief of Ordnance, United States Army, and under the authority of the Secretary of War, party of the second part,

Witnesseth:

Whereas a state of war exists between the United States and certain foreign countries, constituting a national emergency, and the usual requirements of advertisement for bids are dispensed with.

Now, therefore, the parties hereto, in consideration of the mutual agreements herein contained have agreed and do hereby agree with each other as follows:

Article I. Definitions.—Whenever in this contract the words "hereinafter enumerated" are used, they shall mean what is set opposite them:

[fol. 8] Contractor: The party of the first part and its legal representatives, successors and assigns.

Chief of Ordnance: The chief of ordnance, the acting chief of ordnance, or any duly authorized representative of either.

Contracting Officer: The officer in whose name this contract is executed, his successor or successors, his or their duly authorized agent or agents, and any one from time to time designated by the chief of ordnance to act as contracting officer.

Articles: The articles or things to be furnished under this contract, unless some other articles or things are specifically referred to.

Article II. Articles to be Furnished; Deliveries and Prices.—The contractor shall manufacture for and furnish to the United States

the articles hereinbelow described, in the number or amount, at the times and at the prices below stated; said articles to comply with the specifications and drawings hereto annexed or referred to below or in schedule 1 hereto annexed; and the United States shall accept and pay for said articles upon the terms and conditions hereinafter set forth. The workmanship and quality of the articles shall, in the absence of other provisions, be the best of their respective classes and free from latent defects.

Articles: Seventy-five thousand (75,000) Very pistols, 25 m-m, mark IV.

Price: Five dollars (\$5) for each pistol f. o. b. cars St. Louis, Mo., or three hundred seventy-five thousand (\$375,000) for all of the pistols herein contracted for subject to deductions as provided in Article Xa, page 2a hereof.

The delivery of the articles shall commence September 1, 1918, [fol. 9] and shall continue at the rate of at least 12,500 pistols per month. All deliveries shall be completed prior to March 1, 1919.

Shipping instructions will be supplied by the supply division, ordnance office.

Article III. Specifications.—The specifications and drawings, if any, hereto annexed or herein referred to are made a part of this contract with like effect as if herein set out in full. In the event of any conflict between the contract and the specifications or drawings the provisions of the contract shall govern.

From time to time, by written notice to the contractor, the contracting officer may make changes in the specifications and drawings or supplemental or substituted specifications and drawings. If any such change increases the cost to the contractor, a fair addition shall be made to its compensation; but if it reduces such cost a fair deduction shall be made therefrom, all as shall be determined by the chief of ordnance. No claim for additional compensation hereunder shall be allowed, nor shall the compensation be reduced, unless the change has been ordered in writing. For any delay in delivery attributable to such changes, a corresponding extension of time shall be allowed the contractor.

Article IV. Component Parts to be Furnished by United States.—The United States shall furnish without cost to the contractor the materials and component parts listed on schedule 2, in quantities determined by the chief of ordnance to be requisite for the performance of this contract. Should the contractor be delayed in making deliveries of the articles by reason of delays in the furnishing of such materials or component parts by the United States, a corresponding extension of time shall be allowed the contractor.

[fol. 10] In addition to the raw materials and component parts listed on schedule 2, the United States may from time to time, at its option, furnish to the contractor other materials and component parts for use in the performance of this contract: Provided, however, that the contractor has not previously and in good faith contracted for the purchase of such materials or component parts. Un-

less it is provided in writing that materials and component parts (other than those listed in schedule 2) are furnished by the United States without charge, the United States shall be credited with the value thereof, f. o. b. contractor's plant, fixed at the estimated cost of such materials or component parts used in determining the contract price of the articles, the contractor to pay demurrage, storage, cartage and switching charges. Payments for the articles shall be reduced accordingly.

All materials and component parts furnished by the United States shall comply with the specifications and shall remain the property of the United States. The contractor shall account for all materials and component parts furnished by the United States, the cost of which has not been paid by or deducted from payments made to the contractor, in finished product, scrap, unused material or otherwise, and shall make such disposition thereof as may be ordered in writing by the chief of ordnance. Upon final delivery of the articles, and prior to final payment thereof, the contractor shall deliver to the chief of ordnance a sworn statement, in form satisfactory to him, of the quantity of such unused material or component parts remaining in the contractor's possession.

Article V. Change in Amounts.—This contract may be considered as completed and so certified by the chief of ordnance upon delivery to and acceptance by the United States of the articles, plus or minus 5 per cent thereof. In the former case there shall be a proportionate increase and in the latter case a proportionate decrease in the total amount payable under this contract.

Article VI. Delivery.—The articles shall be suitably packed, boxed and marked by the contractor, as directed from time to time by the chief of ordnance, and shall be delivered by the contractor f. o. b. cars at the railroad station nearest to the place of manufacture, unless some other place of delivery is herein specified. The contractor shall, at the cost of the United States, ship the articles to any point in the United States designated by the chief of ordnance.

Article VII. Payment. (Omitted.)

Article VIII. Time.—Time is of the essence of this contract. The contractor shall give the performance hereof preference and priority over any other work except work heretofore given preference or priority by the United States. It shall, from time to time, and whenever requested so to do, furnish the contracting officer reports on the progress of the work.

Article IX. Inspection; Rejection.—All materials and component parts unused or in process, the machinery, the equipment and the plant used in the performance of this contract, and the finished articles, shall at all times be subject to inspection by persons designated by the chief of ordnance, and the contractor shall furnish reasonable facilities and assistance for all such inspection and for testing. Whatever of the materials or component parts not furnished by the United States, or of the articles, do not in all respects comply

with the requirements of this contract, shall be rejected, and the decision of the chief of ordnance with respect thereto shall be final. [fol. 12] The chief of ordnance may require the replacement of all rejected materials, component parts, and articles, and the United States may withhold from the payments to be made hereunder an amount sufficient to cover the cost thereof until such replacement. Upon notice from the contractor that the articles, or any of them, are completed and ready for delivery, final inspection shall be promptly made by the United States.

The process of manufacture shall be at all times subject to the inspection and supervision of the chief of ordnance.

Article X. Care of Property.—The contractor shall use due and proper care to protect all property of the United States in its possession. Such property shall be suitably marked for identification and shall be kept separate and apart from other property.

Article X-a. The unit price of five dollars (\$5) for each pistol as set forth in Article II, page 1 hereof, is based first on the furnishing of sand castings for the pistols by the contractor; second, on the furnishing of handles of walnut or some other wood acceptable to the engineering division of the ordnance office by the contractor, and third, on the furnishing by the United States of test cartridges to be used for inspection purposes.

The United States, however, has the option of furnishing die castings for 45,000 of the pistols herein contracted for and last delivered by the contractor by giving the contractor notice of its intention so to do immediately upon the receipt by the United States of written notice from the contractor that it has completed delivery of 15,000 pistols hereunder. It is agreed that should the United States furnish the die castings, a reduction of one dollar forty-five cents (\$1.45) [fol. 13] shall be made from the unit price of each pistol set forth in Article II, page 1 hereof. The die castings furnished by the United States shall be delivered f. o. b. contractor's factory, St. Louis, Mo.

The United States also has the option of furnishing 45,000 bakelite handles, ready for assembling, for 45,000 pistols herein contracted for, and last delivered by the contractor by giving the contractor notice of its intention so to do immediately upon the receipt of written notice from the contractor that it has completed the delivery of 15,000 pistols hereunder. It is agreed that should the United States furnish the bakelite handles a reduction of fifteen cents (\$0.15) shall be made from the unit price of each pistol set forth in Article II, page 1 hereof. The bakelite handles furnished by the United States shall be delivered f. o. b. contractor's factory, St. Louis, Mo.

Article X-b. Payment.—1. A sum equal to eighty per cent (80 per cent) of the actual cost to the contractor of direct materials, as defined in ordnance office pamphlet "Definition of 'Cost' Pertaining to Contracts," dated June 27, 1917, on pages 4, 5 and 6, purchased by the contractor in quantities requisite for the due and

timely performance of this contract, and from sources approved by the chief of ordnance, will be paid to the contractor by the United States monthly upon certificate of the inspecting and receiving officer that such materials have been delivered to the contractor and inspected and approved by the United States. All such materials shall immediately upon coming into the possession of the contractor be marked for identification as the chief of ordnance may direct. When any such payment shall have been made by the United States for such materials the ownership of the same shall [fol. 14] vest in the United States. The contractor shall replace either in money or in kind at the option of the United States all material so owned by the United States which may subsequently develop latent defects or become spoiled or destroyed through fault of the contractor while in its possession.

2. The difference between ninety-five per centum (95 per cent) of the contract price for each completed lot of ten (10) or more of the articles less deductions as provided in Article X-a, page 2-a hereof, if any, and the amount theretofore paid by the United States on account of direct material, for each lot of ten (10) or more of the articles, will be paid to the contractor promptly on delivery to and acceptance by the United States of such lots of ten (10) or more of the articles.

3. Upon proper certificate of the inspecting and receiving officer of the United States, showing delivery and acceptance of all the articles, the United States will pay to the contractor the difference between the contract price less deductions as provided in Article X-a, page 2-a hereof, if any, for all the articles delivered and the total sum theretofore paid to the contractor.

4. In no event shall the total payments herein provided for exceed the contract price.

Article X-c. Costs under Article XIV shall be determined in accordance with the pamphlet entitled "Definition of 'Cost' Pertaining to Contracts," issued by the office of the chief of ordnance, war department, dated June 27, 1917, made a part hereof by reference.

Article XI. Storage.—The contractor shall provide at its plant storage capacity sufficient for the storage of — days' deliveries of articles at the rate of deliveries herein specified. From time to time, [fol. 15] and for so long as the chief of ordnance may require, the contractor shall safely and adequately store to the extent of such storage capacity any accepted articles which the United States is not ready to have shipped; such storage to be at the risk of the United States but at the cost of the contractor. By written notice the chief of ordnance at any time may require the contractor promptly to furnish additional storage capacity sufficient to store not more than — days' deliveries at said rate. Thereafter from time to time, and for so long as the chief of ordnance may require, the contractor shall safely and adequately store any accepted articles to the extent

of such additional storage capacity, but at the cost and risk of the United States. The additional storage capacity shall be furnished at the contractor's plant, if practicable, and when that is not practicable, at a place adjacent to or near the plant. Subject to the approval of the chief of ordnance, such place shall be selected by and the arrangements made therefor by the contractor. If a portion of the land and buildings then belonging to the contractor be used for such additional storage, the United States will pay to the contractor a reasonable rental therefor, to be agreed upon, or, in the absence of an agreement, to be fixed by the chief of ordnance.

The articles stored under the provisions of this article after final inspection and acceptance shall be paid for as though they had been delivered f. o. b. cars, but the contractor shall thereafter, upon the request of the United States and at the expense of the United States, transport the articles stored to the nearest point of shipment by railroad, load the same on cars, and ship the same to such point of [fol. 16] destination as the chief of ordnance may direct. The United States shall pay to the contractor all expense incurred for transportation of the articles to storage and cost of unloading and reloading cars at place of storage.

Article XII. Excusable Delays.—The contractor shall not be held responsible for delays in delivery determined by the chief of ordnance to be due to delay in inspection, delay in the giving of shipping instructions to the contractor, explosions, fires, riots, labor strikes, acts of war, acts of God, or to any other causes beyond the control of the contractor. The contractor shall use its best efforts to remove such cause of delay as speedily as possible, and immediately upon the removal thereof shall proceed with the performance of this contract. The time for the making of deliveries shall be extended by the period of such delay, provided application therefor be made in writing within thirty (30) days after the removal of such cause for delay. Where, however, such delays have been substantial and not due to any act or omission of the United States, the chief of ordnance shall have the option either to cancel this contract or any of the deliveries that have been delayed upon the terms set forth in Article XIV hereof or to permit the contractor to proceed with the performance of the contract.

Article XIII. Breach of Contractor.—If the contractor shall abandon this contract or shall violate any material provision thereof, or shall fail at any time to prosecute with diligence the manufacture of the articles or the performance of this contract, or if this contract shall be assigned, the chief of ordnance may, without prejudice, to any other rights or remedies or to any claim which the United States may have, terminate this contract by written notice and complete the performance hereof or enter into agreements with other parties for the completion of the performance hereof in whole or in part or purchase in the open market or otherwise any articles remaining undelivered hereunder; and the contractor shall pay to the United States all loss and damage incurred as a result of such action.

Article XIV. Termination.—This contract being necessitated by a state of war now existing, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the chief of ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore provided that any time, and from time to time, during the currency of this contract, the chief of ordnance may for any of the causes above stated notify the contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered.

In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the contractor the price herein fixed for all articles accepted by and delivered to the United States. The United States shall also pay to the contractor the cost of the materials and component parts purchased by the contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract provided they comply with the specifications, and also all costs shown by the contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid; and the United [fol. 18] States shall also protect the contractor on all obligations incurred necessarily and solely for the performance of this contract of which the contractor cannot be otherwise relieved. To the above may be added such sums as the chief of ordnance may deem necessary to fairly and justly compensate the contractor for work, labor and service rendered under this contract.

Title to all such materials and component parts paid for by the United States under this article shall, immediately upon such payment, vest in the United States.

The United States may refuse to make any payment or to reimburse the contractor for or on account of material or component parts intended to form a part of the articles, whether unused or in the process of manufacture or manufactured, in respect of delivery of which the contractor shall be in arrears not due to causes beyond its control at the time of such termination.

Article XV. Precautionary Measures.—In addition to the ordinary precautions heretofore adopted by the contractor for the guarding and protecting of its plant and work, the contractor shall provide such additional watchmen and devices for protection of its plants and property and the work in process for the United States espionage, acts of war, and of enemy aliens as may be required by the chief of ordnance. The contractor shall, when required, report to the chief of ordnance the citizenship, country of birth, or alien status of any and all of its employees. When required by the chief of ordnance the contractor shall refuse to employ, or if already employed, forthwith discharge from employment and exclude from its works any person or persons designated by the

chief of ordnance for causes undesirable for employment in a plant [fol. 19] engaged on work for the United States. The United States shall pay to the contractor as part of the cost of the articles any expense incurred by the contractor which shall be determined by the chief of ordnance to be directly caused by the requirements of the article.

Article XVI. Exploitation Forbidden.—The contractor agrees to refrain from exploiting by publicity or otherwise its products manufactured in pursuance of this contract, and of any and all contracts and orders heretofore or hereafter entered into or placed with the contractor, and its products manufactured under any arrangements with the United States whatsoever, and the contractor agrees to refrain from in any way publicly advertising the fact of the manufacture of said product, and to refrain from publishing or causing or allowing to be published any photographs, drawings, written or printed matter, or other data disclosing the articles, or parts of the same, or the process of manufacture, or the plans of the government, or any information concerning the same or which shall result in such disclosure. The contractor agrees to submit to the chief of ordnance all pictures or printed matter showing, describing or in any way relating to the progress of the work to be prosecuted under this contract and under any and all contracts and orders heretofore or hereafter entered into or placed with the contractor, or under any arrangements with the United States whatsoever, which he may desire to publish, before publishing the same, and the chief of ordnance may prohibit such publication. The contractor further agrees to refrain from giving any information whatsoever relative to any experiments that may be carried out by it at the instance of the United States.

Article XVII. Contract not Assignable.—The contractor shall not assign, transfer, or otherwise dispose of this contract or any [fol. 20] part thereof without the written consent of the Secretary of War, nor shall it assign any moneys due or to become due hereunder.

Article XVIII. Subcontracts.—The contractor shall insert in every contract hereafter made in relation to the performance of this contract a provision that such contract may be assigned by the contractor and that it relates to this contract. The contractor shall, from time to time, upon request, exhibit to the contracting officer any and all contracts made in connection with the performance of this contract.

Article XIX. Waiver of Liens.—The contractor hereby waives and releases all lien or right of lien now existing or that may hereafter arise for work or labor performed or materials furnished or for any other reason or cause under this contract, under any lien laws, state or federal, upon any component parts, materials, supplies, and the like coming into its possession, which it is herein contemplated shall presently or ultimately become the prop-

erty of the United States, and the contractor agrees not to create or suffer to be created any mortgage, lien, pledge, attachment, or other incumbrance upon any such component parts, material, supplies, or other property in its possession intended to form a part of the articles to be delivered under this contract. In the event that such mortgage, pledge, lien, attachment, or incumbrance arises, immediately to bond same to the end that all property shall at all times be and remain free from all incumbrances.

Article XX. Disputes.—Except as herein otherwise specifically provided, any doubts or disputes which may arise under this contract or as to its performance or non-performance shall be referred to the chief of ordnance for determination. If the contractor shall [fol. 21] feel aggrieved at his decision, it shall have the right of appeal to the Secretary of War, whose decision shall be final.

Article XXI. Patents.—The contractor hereby covenants and agrees to hold and save the United States and all persons acting under them harmless from and against all and every demand or demands of any nature or kind for or on account of the adoption of any plan, model, design or suggestion or for or on account of the use of any patented invention, article, or appliance that has been or may be adopted or used in or about the construction of said articles, or any part thereof, under this contract, and to protect and discharge the United States from all liability on account thereof, or on account of the use thereof, by proper releases from the patentees, and by bond if required, or otherwise, and to the satisfaction of the chief of ordnance.

Article XXII. Notice.—Any notice addressed to the contractor at its principal office and either there delivered or deposited in a post-paid wrapper in any post-office box regularly maintained by the United States shall be deemed to have been served upon the contractor. The address of the contractor may be changed at any time by notice in writing to the contracting officer. Nothing herein contained shall preclude service of notices upon the contractor (1) where it is a corporation by delivery thereof to any of its officers or directors in person; (2) where it is a firm by delivery thereof to one of the partners; (3) where it is an individual by delivery thereof to him in person.

Article XXIII. Officials not to Benefit.—No member of or delegate to Congress or resident commissioner is or shall be admitted to any share or part of this contract or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it [fol. 22] may be within the operation or exception of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109).

Article XXIV. Prison Labor.—No person or persons shall be employed in the performance of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several states, territories, or municipalities having criminal jurisdiction.

In witness whereof the parties hereto have caused this contract to be duly executed in triplicate by their respective officers, thereunto duly authorized, the day and year first above written.

(Signatures) Nat'l Tool and Mfg. Co., W. I. Ireland, Sec.,
Contractor. United States of America, by R. P. Lamont,
Lt. Col. Ord. Dept., U. S. A.

Witnesses: ———

War—Ord. 13030-2303TW

Schedule 1 Attached to and a Part of a Certain Contract Between the United States of America and National Tool and Manufacturing Company and Dated the Fifth Day of August, 1918.

Each and every of the pamphlets, drawings, specifications, and other papers enumerated is made a part of the schedule and of the contract of which this schedule is a part.

Specifications: Ordnance Office EW 653-0, dated July 16, 1918.

Drawings: Ordnance Office, Class 78, Division 2, Drawings 49 and 50, dated July 5, 1918.

Schedule 2: None.

[fol. 23] CLT's Ex. B TO PETITION—Filed May 29, 1924

Partial Payment Supplemental Contract Between National Tool and Manufacturing Company and United States of America

Ordnance Department

Due to Suspension of Contract P 13030-2303TW

Partial Payment Supplemental Contract

Form 2E

This contract made this 21st day of May, 1919, between the United [fol. 24] States of America by E. S. Ready, Major, Ordnance Department, United States Army (hereinafter called "Contracting Officer"), acting by direction of the Chief of Ordnance, United States Army, and under authority of the Secretary of War, party of the first part, and the National Tool & Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware and having an office at St. Louis, Missouri (hereinafter called "Contractor"), party of the second part.

Witnesseth, that

Whereas, the United States and the contractor heretofore executed a certain contract No. P 13030-2303TW, dated August 5th, 1918 (herein called "original contract"), which term also includes, wherever used herein, all agreements, if any, supplementary to said

original contract except this agreement and any other supplemental agreements which may be dated subsequent to the date of this agreement; and

Whereas, the original contract has not been completely performed, but in preparation for, and as a part of complete performance, the contractor has employed capital, performed services, expended money, and incurred liabilities and obligations for which he has not been paid; and

Whereas, because of the suspension of hostilities it has become desirable and is to the best interests of the United States to reduce the amount of deliveries to be made under the original contract and to that end, on the eighteenth day of December, 1918, the Contractor, at the request of the United States has temporarily suspended operations under the original contract, and it is now the purpose of the parties hereto to provide for complete termination of operations under the original contract; and

Whereas, the Contractor has properly made expenditures and incurred obligations, including work, labor and services necessarily rendered, in connection with the performance of said contract, and the contracting officer has made a preliminary examination of the items of said expenditures and obligations and finds that the total amount thereof properly and fairly apportionable to the uncompleted portion of said contract, over and above any sum that may be due to the United States arising out of or incident to the said contract other than advances by the United States, will be not less than the sum of one hundred forty thousand dollars (\$140,000.00), and the Contractor represents that said amount is in excess of said sum of one hundred three thousand six hundred fifty dollars and sixty-six cents (\$103,650.66); and

Whereas, the Contractor is willing to agree to a complete termination of operations under the original contract, and to agree to waive all rights to prospective profits thereunder if he can secure forthwith reimbursement of a portion of the expenditures made and obligations necessarily incurred by him in performance of the uncompleted portion of said contract, and provision for the speedy determination and payment of the various items of reimbursement and remuneration hereinafter set forth.

Now, therefore, the parties hereto agree as follows:

[fol. 26] Article I. The existing rights and obligations of the parties hereto under the original contract shall remain in full force and effect except as herein expressly provided.

Article II. The total quantity of articles or work to be delivered or performed under the original contract and this supplemental agreement, including all deliveries heretofore made, shall be none.

Article III. The Contractor agrees that it will not perform any further work or services, or incur any further expense or obligations in connection with the performance of the uncompleted portion of said original contract, and will use his best efforts in every proper way to reduce such liabilities or obligations as have already been

incurred in connection with such performance; and the Contractor hereby, and for all time, waives all claim to the prospective profits which he might have made from the performance of that portion of said original contract which under the terms of this supplemental agreement will not be performed.

Article IV. In consideration of the premises and that faithful performance by the Contractor of the foregoing covenant, the United States shall forthwith pay to the Contractor the sum of one hundred three thousand six hundred fifty dollars and sixty-six cents (\$103,650.66). No advances have been made by the United States to the Contractor under the original contract.

Article V. In further consideration of the premises, the United [fol. 27] States agrees to pay to the Contractor an additional sum or sums which, together with the sum of \$103,650.66 provided for in Article IV hereof, will reimburse and remunerate the Contractor for such portion of his expenditures, obligations and liabilities necessarily incurred, and for work, labor and services rendered in connection with the performance of the original contract, as is properly and fairly apportionable to the uncompleted portion thereof, and for expenditures incurred and services properly rendered under this supplemental agreement, as follows:

Section A. For raw materials, direct and indirect, and component parts on hand, in an amount not exceeding the requirements for the completion of the contract; Cost-plus inward handling charges plus such portion of overhead as is directly applicable less such sums as may represent the fair agreed value of all or any portion thereof, if the title and possession of the same are retained by the Contractor.

Section B. For articles in process, in an amount not exceeding the requirements for the completion of the contract; Cost of raw material and labor plus such portion of overhead as is directly applicable, less such sums as may represent the fair agreed value of all or any portion thereof, if the title and possession of the same are retained by the Contractor.

Section C. A fair and equitable remuneration (1) for expense and services of the Contractor in connection with the items included in Section A of this article, but not to exceed interest at 6 per cent per annum on the capital invested therein, or if the capital was borrowed, interest at the rate paid by the Contractor; and (2) for expenses and [fol. 28] services of the Contractor in connection with the items included in Section B of this article, but not to exceed 10 per cent of the cost thereof.

Section D. Such amounts as are properly paid by the Contractor in the adjustment and termination of unperformed subcontracts and unperformed commitments for supplies which were properly entered into or made in connection with the performance of said original contract.

Section E. Pay rolls and expenses paid or incurred with the approval of the Contracting Officer, or properly paid or incurred without such approval for the custody and protection of property, since the date of suspension above recited and pending final settlement.

Section F. Where special facilities were properly provided in connection with the performance of the original contract, necessity of which was contemplated by the Contractor and included in his estimate of cost at the time the original contract was made, such portion of the cost thereof as would reasonably have been recouped had the uncompleted portion of the original contract been performed. The amount so allowed shall not exceed a sum which shall be computed as follows: From the cost of such special facilities deduct their fair value at the date hereof, and state such portion of the remainder as is represented by the ratio of the uncompleted portion to the whole of the original contract.

Section G. Such additional sums, if any, as the Secretary of War may deem necessary fairly and justly to compensate to the Contractor [fol. 29] for expenditures, obligations, and liabilities necessarily incurred and for work, labor and service, necessarily rendered, under the original contract or in preparation for the performance thereof, or under this supplemental agreement.

Article VI. Title to all property paid for by the United States made under the original contract or under this supplemental agreement shall vest in the United States immediately upon payment therefor.

Article VII. The United States shall proceed with the Contractor to determine the exact amount of the several items which make up the total amount payable to the Contractor under the original contract and this supplemental agreement. When any sum is so found to be justly due the finding shall be evidenced by a certificate of the Contracting Officer, or other officer duly authorized by the Secretary of War, which certificate shall state the amount found to be due and the item or items with respect to which the finding is made, and if any property is to be transferred in connection with or as a consideration for such payment, the said certificate shall list the property so to be transferred or delivered. Upon approval by the Contractor of such certificate or certificates the amount thereof up to the sum of one hundred three thousand six hundred fifty dollars and sixty-six cents (\$103,650.66), agreed to be paid under Article IV hereof, shall be offset against the said sum and the United States will pay to the Contractor any additional sum or sums found and certified to be due; provided, however, that in no event shall the aggregate payments made or to be made under this supplementary agreement and under the original contract exceed the amounts which would [fol. 30] have been payable under the original contract and if the said contract had been fully performed. The approval by the Contractor of any such certificate up to the amount specified in Article IV hereof or the acceptance of payment under any certificate for

any additional sum shall constitute a release of all the Contractor's rights then existing or which may thereafter exist growing out of or relating to the item or items covered by any such certificate.

Article VIII. In the event of the transfer or delivery to the United States of any property, the Contractor shall expressly warrant all such property as free and clear of all encumbrances, either legal or equitable, and shall either deliver the same to the United States or if requested shall care for, mark for identification, and arrange for storage of same in a manner which shall be mutually agreeable.

Article IX. This agreement shall not become a valid or binding obligation of either party hereto unless and until the approval of the St. Louis District Claims Board has been noted at the end of this instrument.

In witness whereof, the parties hereto have caused this agreement to be duly executed in five parts as of the date first hereinabove written.

Witnesses: Josephine Burnes, as to E. S. Ready, Major Ord. Dept., U. S. A., Contracting Officer. M. K. Lenny, as to [fol. 31] National Tool & Manufacturing Co., Contractor, by W. S. Ireland, President.

Approved: St. Louis District Claims Board, by M. E. Singleton.

Attest: George C. Hargrove, Secretary.

Dated St. Louis, Missouri, the 21st day of May, 1919.

War Department, Ordnance Office

Item: Payment No. —

Certificate of Findings Authorized—Items Payments—Form S

1. Issued under contract between National Tool & Manufacturing Company, Contractor, and the United States of America, by E. S. Ready, Major, Ordnance Department, Contracting Officer, dated August 5th, 1918, War-Ord-No. P 13030-2303 TW.

2. I hereby certify that production under the above contract was terminated or reduced and an agreement was made to adjust, pay, settle, and discharge the same by a supplemental contract dated May —, 1919, of which a copy has heretofore been filed with the Auditor for the War Department and which will remain in full [fol. 32] force and effect notwithstanding this item payment; and I find and certify from the evidence and proof submitted, which cannot be transmitted herewith but will be transmitted with the certificate of final payment under said contract that certain matters and things were done in and about said contract which are represented by the item stated below which is immediately payable under Article IV of said agreement and the schedule of articles hereto attached; that they are of the amount and value herein stated; that they are separate from all other matters and things and payment therefor should now be made by the United States and the ownership

of the articles in said schedule be delivered to the United States, otherwise further claims, liabilities and losses against the United States will be incurred, and that there is certified for payment as correct and just and in full settlement, release and discharge of all obligations of the United States under said Article IV of said agreement and matters and things contained and represented herein, or intended so to be, the amount of \$103,650.66.

3. The United States does not come into possession or ownership of any property by virtue of the above payment.

4. There were no advance due to the United States from the Contractor by virtue of the above contract.

5. Under the above contract and under the payment on account of the above item, no property has been or will be conveyed by the United States to the Contractor.

6. I further certify that there are no known claims of the United [fol. 33] States against the Contractor arising out of or incident to the original contract which are not covered in reaching the foregoing determination.

Items			
(1) Unworked direct materials.....		\$14,097.75	
(2) Indirect materials		None.	
(3) Worked direct materials.....		12,741.64	
(4) Direct labor and overhead expense.....		14,120.30	
(7) Commitments for materials or service.....		19,532.89	
(8) Claims for other compensation:			
a. Mach. and Equip.....	1,814.67		
b. Mach. and Equip.....	280.56		
c. Mach. and Equip.....	6,863.90		
d. Mach. and Equip.....	18,225.35		
e. Small tools made.....	1,885.50		
f. Small tools made.....	125.46		
g. Small tools made			
(Labor and overhead).....	31,123.87		
h. Small tools purchased.....	113.75		
i. Small tools purchased.....	581.81		
j. Miscellaneous	351.29		
		\$61,309.16	
		<hr/>	
		\$121,861.74	\$121,861.74
Deductions			
(1) Claims of the United States against the Contractor arising out of or incident to the prime contract or for loans in connection therewith.....		None.	
(2) Amount due to the United States, being the fair value of property transferred the Contractor in his settlement.....		None.	
(3) Scrap if retained by Contractor from worked materials		349.74	
(4) Allowance to the United States for fair value of property retained by Contractor in this settlement		17,861.34	
		<hr/>	
Total Deductions		\$18,211.08	\$18,211.08
		<hr/>	
Balance due contractor.....			\$103,650.66

Date: May 21st, 1919.

[fol. 34] Approved by the St. Louis District Ordnance Claims Board for \$103,650.66.

Attest: M. E. Singleton.

Date: May 21st, 1919.

Accepted: National Tool & Manufacturing Co., Contractor. W. S. Ireland, President.

Dated May 19th, 1919.

Contracting Officer's Certificate

I hereby certify that I have satisfied myself of the authority of the person signing the Contractor's name to this agreement to bind it in the matter, and I have waived the filing of evidence of such authority as permitted so to do by Army Regulations.

E. S. Ready, Major Ord. Dept., U. S. A., Contracting Officer.

[fol. 35]

II. HISTORY OF PROCEEDINGS

On March 16, 1922, the defendant filed a motion to dismiss this case for want of jurisdiction.

On October 16, 1922, the defendant's motion to dismiss for want of jurisdiction was argued by Messrs. W. F. Norris and John E. Hoover, for defendant, and by Mr. Raymond M. Hudson, for the plaintiff, and thereupon ordered that the demurrer be overruled without prejudice.

III. ARGUMENT AND SUBMISSION

On October 22, 1924, this case was argued and submitted on merits by Mr. Raymond M. Hudson, for the plaintiff, and by Mr. John E. Hoover, for the defendant.

[fol. 36] **IV. Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.**—Entered January 26, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

The plaintiff is a corporation organized and existing under the laws of the State of Delaware; and both it and the National Tool

and Manufacturing Co., subsequently the Blue Bird Manufacturing Co., hereinafter referred to, and their officers, have at all times borne true allegiance to the United States Government and have never aided or abetted the enemies of said Government.

II

The said National Tool and Manufacturing Co. is a corporation created and existing under the laws of the State of Delaware, with its principal place of business in St. Louis, Mo., where it was, during the latter part of the late World War, actively engaged in a general manufacturing business.

III

On or about July 29, 1918, properly authorized officers of the United States War Department placed a verbal order with the said National Tool and Manufacturing Co. for the manufacture of 75,000 Very signal pistols, which was followed on August 1 with a regular procurement order for said pistols; and under date of August 5, 1918, a formal contract, No. P13030-2303 TW, was entered into by the company and the Government for the manufacture of said pistols according to certain specifications and drawings annexed to the contract.

The contract provided, among other things, that delivery of the pistols by the company should commence September 1, 1918, and should proceed at the rate of 12,500 pistols per month, all deliveries to be completed before March 1, 1919; that the price for the pistols [fol. 37] should be \$5 each, making \$375,000 in all; that changes in the specifications and drawings might, from time to time, be made by the contracting officer representing the Government, with corresponding increase or decrease in the contract price, as the change might increase or decrease the cost of manufacture; that the contract should not be assigned or otherwise disposed of by the contractor without the written consent of the Secretary of War; and that no moneys due or to become due under the contract should be assigned by the contractor. The contract further provided, Article XIV, for its termination in the event of the termination or limitation of the war, as follows:

"Termination.—This contract being necessitated by a state of war now existing, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the chief of ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore provided that any time, and from time to time, during the currency of this contract, the chief of ordnance may for any of the causes above stated notify the contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered.

In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the contractor the price herein fixed for all articles accepted by and delivered to the United States. The United States shall also pay to the contractor the cost of the materials and component parts purchased by the contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract provided they comply with the specifications, and also all costs shown by the contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid; and the United States shall also protect the contractor on all obligations incurred necessarily and solely for the performance of this contract of which the contractor can not be otherwise relieved. To the above may be added such sums as the chief of ordnance may deem necessary to fairly and justly compensate the contractor for work, labor and service rendered under this contract."

A copy of said contract is annexed to the plaintiff's petition as Exhibit A, which is by reference made a part of this finding.

IV

The contractor immediately entered upon the performance of the contract; but there were numerous discrepancies and errors in the specifications and drawings, and beginning almost immediately after the execution of the contract and continuing for more than two months thereafter, there were numerous changes ordered by the Government which held up and delayed the work of manufacture so that no pistols were completed nor deliveries made prior to the suspension and termination of the contract as hereinafter set forth.

V

[fol. 38] On December 11, 1918, the armistice having in the meantime been declared, the Ordnance Department addressed a letter to the contractor at St. Louis, requesting suspension of the contract work, reading as follows:

"Gentlemen: 1. By direction of the Chief of Ordnance you are requested in the public interest immediately to suspend further operations under your contract with the United States, War-Ord-No. P13030-2303TW, and to order no further materials or facilities, and except in cases of proved necessity, enter into no further subcontracts, make no further commitments, and incur no further expenses in connection with the performance of said contract.

"2. This request is made with a view to the negotiation of a supplemental contract providing for the cancellation, settlement, and adjustment of your existing contract in a manner which will permit of a more prompt settlement and payment than will be practicable under the terms of said existing contract.

"3. Please acknowledge receipt of this notice immediately, and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation."

This letter was forwarded to the contractor by Maj. E. S. Ready, of the Ordnance Department, with a letter of December 14, 1918, from Major Ready to the contractor, in which he said, referring to said letter and request for suspension:

"Upon acceptance of this request, the negotiation of a settlement in the formation of a supplemental contract, as referred to in the attached letter, will be initiated by the St. Louis District Claims Board. You will appreciate that in this way a more prompt settlement and payment is practicable than under the terms of the existing contract. The department at Washington has advised that unless acknowledgment is received by that office within ten days after the date of suspension notice, cancellation proceedings will be started."

Upon receipt of said letters of December 11 and 14, the contractor, on December 18, 1918, wrote the Ordnance Department, with reference to said contract, as follows:

"This is to acknowledge receipt of notice of suspension of the above contract. We accept this suspension effective December 18, 1918, without prejudicing our rights under said contract. We take it from your request that immediate steps will be taken towards the negotiation of a settlement in the formation of a supplemental contract, thereby affording a prompt adjustment, settlement and payment arising from the suspension and eventual cancellation of the original contract, and accept this condition as a consideration in our acceptance of the request for suspension."

Work under the contract as thereupon suspended by the contractor, and was not thereafter resumed.

On December 27, following, the secretary of the Ordnance Department District Claims Board at St. Louis wrote the contractor as follows:

"Gentlemen: Acknowledgement is made of your favor of the 18th, advising that in pursuance of the request of the Ordnance Department, you will suspend operations under War Order No. [fol. 39] P13030-2303 TW.

"The Ordnance Department desires to do all in its power consistent with the interests of the United States to arrive at a settlement which will enable you to take up your regular line of business with the least delay.

"To this end there is enclosed an outline of method for presenting claims of contractors. You are urged to give same careful study and be prepared to act accordingly.

"When received from the printer, you will be sent finance forms in sufficient number for the preparation of your claim, as provided under II-B, page 2 of the above-mentioned outline. Before making out the claim careful consideration should be given to the instructions as to the use of such forms (Part II of the above-named enclosure). You should fill out, execute as provided, and forward promptly to the undersigned such of the sheets as may be applicable to your claim. This statement will give this office the necessary information to enable it to proceed. Acknowledgment is requested."

VI

Pursuant to the correspondence and action set forth in Finding V, the contractor, on or about January 16, 1919, filed a claim in the sum of \$189,507.38, made up as follows:

1. Unworked direct materials.....	\$14,097.75
2. Worked direct materials.....	12,741.64
3. Direct labor and overhead expense.....	14,120.30
4. Commitments for materials and service.....	19,532.89
5. Machinery and equipment.....	27,184.48
6. Small tools made and purchased, including labor and overhead.....	33,833.39
7. Miscellaneous.....	351.29
8. Rent.....	800.00
9. Expenses of rearrangement of plant and equipment	5,750.00
10. Ten per cent profit on items 1, 2, 3, 4, 6 and 7....	9,467.72
11. Interest for three months at 6 per cent on the amount of items 1 to 7, inclusive.....	1,827.92
12. A profit of \$1.66 each on 30,000 pistols which could have been completed before the termination of the contract but for the delay caused by the Gov- ernment's changes in the specifications and draw- ings.....	49,800.00

Against this claim of \$189,507.38, a credit of \$18,211.08 was given the Government on account of the retention by the plaintiff, at agreed prices, of the greater part of the materials purchased by it for the contract work, and which, under the terms of the original and supplemental contracts, were to become the property of the Government upon its termination of the contract and payment therefor, which credit left a net claim of \$171,296.30 against the Government.

VII

Under date of May 21, 1919, a partial payment supplemental contract was entered into between the contractor and the Ordnance Department contracting officer representing the Government, for the termination of operations under the original contract, upon the basis of an immediate reimbursement of the contractor, by an advance payment of \$103,650.66, for a portion of the expenditures

made and obligations necessarily incurred in its operations under the contract, and a speedy determination and payment of the various items of such expenditures and obligations, as specifically provided for in said supplemental contract; and of a waiver by the contractor of a claim to prospective profits as therein specified, the then existing rights and obligations of the parties under the original contract to remain in full force and effect as was otherwise expressly provided in the supplemental contract.

VIII

The said supplemental contract of May 21, 1919, was as follows:

"PARTIAL PAYMENT SUPPLEMENTAL CONTRACT—Omitted; printed side page 23 ante

[fol. 43]

IX

Pursuant to the said supplemental contract the contractor was paid said sum of \$103,650.66, as an advance payment on its claim, and subsequently was tendered, in full settlement of its claim under said contracts, original and supplemental, the further sum of \$14,192.25, which the Ordnance claims board had, on or about February 4, 1920, found to be due the contractor under said contracts, making a total of \$117,842.91 found due it under the contracts. In arriving at this amount, the claims board allowed the precise amounts of all the items claimed by the contractor except as to the following items: On the said item of \$9,467.72 claimed as 10 per cent profit on the greater part of the contractor's claim, as [fol. 44] shown by finding VI, the allowance was \$5,999.98; and on the said item of \$1,827.92 claimed as interest, the allowance was \$1,642.27. The item of \$49,800 claimed as profits that would have been realized by the contractor on pistols that would have been completed and delivered before the suspension and termination of the contract but for the delay in the work caused by the Government, was wholly disallowed on the ground that it was prospective profits.

The contractor refused to accept this proposed final settlement, and took an appeal to the War Department Board of Contract Adjustment, by which board the decision of the Ordnance Claims Board was affirmed, on or about May 11, 1920.

It does not appear that any other items of claim than those shown by Findings VI and IX were ever formally filed by the contractor with, or were allowed by, either the Chief of Ordnance or the Secretary of War.

X

The total cost and expense to the contractor of its operations under the said contract of August 5, 1918, together with the remuneration provided for by Section C of the said supplemental contract of May 21, 1919, amounted to \$136,053.99. Of this amount the contractor has been paid by the Government the said advance payments of

\$103,650.66 provided for by the supplemental contract, and the said sum of \$18,211.08 in materials retained by the contractor, leaving an unpaid balance of \$14,192.25, consisting of the following items:

For rent	\$800.00
For expenses of rearrangement of plant due to delay caused by Government changes in specifications and drawings.	5,750.00
For interest on capital invested, as provided for by section C of the supplemental contract	1,642.27
For profit on certain costs and expenses under the contract, as provided for by section C of the supplemental contract	5,999.98

XI

If the profits the contractor would have realized upon a full performance of the contract work be apportioned between the performed and the unperformed portions of the work, the amount of such profits apportionable to the portion of the work that had been performed at the time of the suspension and termination of the contract would be \$62,746.10.

If the contract work had not been delayed by the said Government errors and changes in the specifications and drawings, the contractor would have completed and delivered such quantities of the said signal pistols prior to the suspension and termination of the contract as would have yielded a profit of \$44,818.64 thereon, over and above their cost to the contractor.

XII

By amendment of its certificate of incorporation on or about April 21, 1919, the said National Tool & Manufacturing Co., the contractor, changed its name to the Blue Bird Manufacturing Co. [fol. 45] Shortly thereafter the Blue Bird Manufacturing Co. became insolvent and went into the hands of receivers, appointed by the Circuit Court of the city of St. Louis, Mo.

On or about June 30, 1920, the said Blue Bird Manufacturing Co. and the said receivers therefor entered into a contract with the Davis Sewing Machine Co., of Dayton, Ohio, subject to the approval of the said Circuit Court of the City of St. Louis, for the sale by the said Blue Bird Manufacturing Co., to the said Davis Sewing Machine Co., of all the Blue Bird Co.'s assets, rights, privileges, and good will, for which payment was to be made to the Blue Bird Co. in certain specified stock of a new Davis Sewing Machine Co. which the said Davis Sewing Machine Co. of Ohio was to cause to be incorporated under the laws of the State of Delaware, and to which new company the Davis Sewing Machine Co. of Ohio was to convey a great part of its assets and all of the assets of the Blue Bird Manufacturing Co. to be acquired by the said Davis Sewing Machine Co. of Ohio under said contract. On or about July 15, 1920, the said contract was

approved by said Circuit Court of St. Louis, and the receivers were ordered and directed by the court to carry out the contract. Thereupon the said new company, the Davis Sewing Machine Co. of Delaware, the plaintiff in this suit, was organized and incorporated; the sale and transfer of the assets of the Blue Bird Manufacturing Co. to the Davis Sewing Machine Co. of Ohio, and the transfer of said assets, and of a great part of its own assets, by said Davis Sewing Machine Co. of Ohio to the new company, the Davis Sewing Machine Co. of Delaware, was effected, all in accordance with the provisions of said contract and the order and direction of the said court.

At the time of the said sale and transfer of the assets of the Blue Bird Manufacturing Co. to the Davis Sewing Machine Co. of Ohio and of their transfer by said company to the said Davis Sewing Machine Co. of Delaware, the claim which is the subject matter of this suit was a part of said assets.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of \$14,192.25. It is therefore adjudged and ordered that judgment be entered in favor of the plaintiff and against the defendant in the sum of fourteen thousand one hundred and ninety-two dollars and twenty-five cents (\$14,192.25).

OPINION

GRAHAM, Judge, delivered the opinion of the court:

The contract in this case was dated the 5th day of August, 1918, and was for the manufacture of Very pistols. These pistols were to be used for giving signals by firing a charge which exploded with certain lighting effects. Delivery was to be commenced on the 1st of September, 1918, and completed on the 1st of March, 1919. The number of pistols to be delivered was 75,000, for which the plaintiff was to receive payment in the sum of \$375,000. The contract contained a clause giving the defendant the right to terminate the contract at any time under certain conditions. The [fol. 46] armistice having been declared in November, on the 11th of December the defendant, through the Ordnance Department, addressed a communication to the plaintiff stating that "you are requested immediately to suspend further operations under your contract * * * and to order no further materials or facilities," and further, to "enter into no further subcontracts" or make any "further commitments and incur no further expenses," and stated that the request was made with the view to the negotiation of a supplemental contract providing for cancellation, settlement and adjustment of the existing contract, in a manner that would permit a more prompt settlement and payment than would be practicable under the terms of the existing contract. It concluded by asking

for immediate acknowledgment of receipt of the notice and an indication of plaintiff's decision to comply with or reject the request. On December 14 this letter was forwarded to the plaintiff with a letter from the representative of the Ordnance Department, stating that upon acceptance of the request the negotiation of a settlement in the form of a supplemental contract would be initiated by the St. Louis district claims board, and in this way plaintiff would get a more prompt settlement and payment than under the terms of the existing contract.

Replying to these several letters, on the 18th of December the plaintiff acknowledged the notice of "suspension of the above contract," stating "we accept this suspension, effective December 18, 1918, without prejudicing our rights under said contract," and, further, "we take it from your request that immediate steps will be taken toward the negotiation of a settlement in the formation of a supplemental contract, thereby affording a prompt adjustment, settlement, and payment arising from the suspension and eventual cancellation of the contract, and accept this condition as a consideration in our acceptance of the request of suspension." On December 27 following, the secretary of the Ordnance Department claims board at St. Louis acknowledged this communication of the plaintiff, saying that it was the wish of the Ordnance Department to do all in its power consistent with the interests of the Government to arrive at a settlement which would enable the plaintiff to take up its regular line of business with the least delay, and to this end inclosed an outline of the method for presenting the claim. The plaintiff was requested to give this careful study and be prepared to act. Further instructions were also given as to preparation of the claim upon printed blanks that would be later furnished.

Pursuant to this correspondence the plaintiff on January 16, 1919, filed an itemized claim in the sum of \$189,507.38, in which was a claim for profit of \$1.66 each on 30,000 pistols which could have been completed before the termination of the contract but for the delay caused by the Government's changes in the specifications and drawings. Against this claim the plaintiff entered a credit of \$18,211.08 for certain materials, the property of the Government, which had been turned back to the Government, and then sold to and retained by the contractor, leaving a net claim of \$171,296.30. Thereafter a partial payment and supplemental contract was entered into. Under this supplemental contract the plaintiff was paid the sum of \$103,650.66 as an advance payment, and it was stipulated that the United States agree to pay such additional sum, which together [fol. 47] with this last named sum would cover such portion of his expenditures, obligations, and liabilities necessarily incurred and for work, labor, and services rendered in connection with the performance of the original contract as would be properly and fairly apportionable to the uncompleted part thereof, enumerating the particular classes of items for which payment was to be made. In this supplemental contract the plaintiff waived all claim to prospective profits which he might have made by the performance of the portion of said

original contract which, "under the terms of this supplemental agreement, will not be performed." It was also provided that in addition to the sums to be paid, as just mentioned, there should be paid such sums as the Secretary of War may deem fair and just to compensate the contractor for expenditures, obligations, and liabilities necessarily incurred, and for work, labor, and services rendered under the original contract or in preparation for the performance thereof or under this supplemental contract. Thereafter, on further hearing, the War Claims Board awarded the plaintiff the additional sum of \$14,192.25, which was tendered in full settlement of its claim under the original and supplemental contracts, making a total of \$117,842.91 found due under the contract. In arriving at this sum a part of an item of \$9,467.72, claimed by the plaintiff as 10 per cent profit on the greater part of the contractor's claim, as shown by Finding VI, amounting to \$3,467.74, was disallowed.

The item of \$49,800 claimed as profits by the plaintiff on the pistols which he claimed could have been completed and delivered before the suspension of the contract but for the delay in the work caused by the Government, was disallowed on the ground that it was prospective profits. The contractor refused to accept this proposed final settlement and took an appeal to the War Department Board of Contract Adjustment, which board affirmed the decision of the claims board. It does not appear that any final appeal was taken to the Secretary of War, as provided by the contract.

The plaintiff is here suing apparently, although his claim has assumed different forms and is in different amounts in his petition and proof, for profits which it claims it would have made on pistols that could have been completed and delivered before the suspension of the contract had not the Government delayed the performance of it.

The original contract contained a provision for its termination at the will of the Government, and, except as provided in the clause for termination, is in the same position as a contract made subject to the provisions of the act of June 15, 1917, which the courts have held must be taken to have been read into the contract (see *Meyer Scale Co. v. United States*, 57 C. Cl., 26, and *Russell Motor Car Co. v. United States*, 261 U. S., 514-524). In the last quoted cases it was held that where there was a termination clause there could be no recovery for loss of profits. The right to terminate necessarily contemplates the possibility of not being allowed to complete the contract, with the attendant loss of profits, and the party's bid includes this risk. It also includes the possibility of a termination before any of the articles contracted for are completed. Thus, the right to recover prospective profits is negated by the very insertion of a [fol. 48] termination clause. Profits are a gain a party might have made had he been allowed to complete the contract. Until it is completed it cannot be known whether there would be a gain or a loss. Profits are a gain which is considered in every contract to balance the risks of a loss. They are only recoverable as a part of the damages

claimed for a breach of a contract by preventing its fulfilment according to its terms. Upon proof of a breach of a contract by its illegal termination and proof that he was ready and willing to perform, the party would be entitled to nominal damages; and if he proceeds further to prove his damage by reason of the breach, and shows that he would have made a profit had he been allowed to carry the contract to completion, he will be allowed a recovery for profits as a part of his damages. *United States v. Speed*, 8 Wall. 77; *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 275, 276, and *Yates v. United States*, 15 C. Cls. 119, 125. If, then, there has been no breach, there can be no recovery of damages or of profits as a part thereof. The defendant had a right under this contract to terminate it at will, so its termination and abrogation did not constitute a breach. The plaintiff's rights under the original contract, in case of termination, were fixed by the termination clause in the contract. As to this clause, it is only necessary to say that a reading of it will show that it did not contemplate any payment of profits except as they might be allowed as a part of the award of some sum by the Chief of Ordnance or the Secretary of War in addition to the items of payment therein provided for. As it does not appear that the Chief of Ordnance or the Secretary ever made any such award, it seems unnecessary to discuss the terms of this termination clause further. It also follows that any reservation of rights thereunder by the plaintiff in accepting and agreeing to the request for a cancellation and the making of a supplemental contract does not strengthen its case as far as its rights under this termination clause are concerned.

The plaintiff suspended work at the request of the Government. It is true that it tried to reserve its rights under the original contract, but it nevertheless suspended and entered into negotiations for a settlement, which finally terminated in a supplemental and partial settlement contract under which it accepted payment, as stated, in the sum of \$103,650.66. It thus practically put an end to the original contract and all claims under it. It in effect negotiated itself out of its rights under that contract. It accepted part payment under a settlement contract and is estopped from claiming profits as a part of damages for a breach of the original contract. Having voluntarily terminated the original contract and accepted payment covering in part the outlays and risks under the original contract, it waived its right to any claim for profits thereunder, if it had any. It has no legal standing to sue for damages upon the theory of a breach of the original contract while retaining in its possession money paid on the basis of a settlement of it. Upon what theory can prospective profits be allowed to a party to a contract who has voluntarily participated in such a change in the situation of the parties that the contract can not be performed? The plaintiff could have stood upon such rights as it had under the original contract and demanded a settlement under its provisions and the terms of the termination [fol. 49] clause thereof, though, even under this clause, as stated, it could not have received any payment in the nature of profits unless it had been allowed by the Chief of Ordnance, to whom no appeal

was ever made. Its rights, such as it has, were transferred to the supplemental contract, and are therefore to be determined by the terms of that contract.

If it has a right to recover profits under that contract, the right must be found within its circumference. Under the terms of that contract the contractor waived "all claim to prospective profits which he might have made by the performance of that part of the original contract which under the terms of this supplemental agreement will not be performed." If it be said that there is some uncertainty as to the meaning of this language, this uncertainty seems to disappear when the clause is read in connection with the preamble to this contract, in which it is recited that the contractor "is willing to agree to a complete termination of operations under the original contract, and to agree to waive all rights to prospective profits thereunder if he can secure forthwith reimbursements for a portion of the expenditures made and obligations necessarily incurred by him in the performance of the uncompleted portion of the said contract, and provision for the speedy determination and payment of the various items of reimbursement and remuneration herein set forth." He did receive such reimbursement of the "expenditures made and obligations necessarily incurred by him" in the sum of \$103,650.06 in cash, and an offer of an additional payment of \$14,192.25. These two sums practically covered every item of claim asserted by the contractor in the claim which he presented under the supplemental contract except the amount claimed for profits. In this view of the case, the amount of \$14,192.25 offered by the Government in settlement under the supplemental contract, being reasonable in amount and acknowledged by the Government to be due under that contract, should be paid to the contractor. He should be allowed a judgment for this amount, and it is so ordered.

The question has been raised in this case as to the application of section 3477 of the Revised Statutes, to the effect that assignments and transfers of any claim from the United States "shall be absolutely null and void, unless they are freely made and executed in the presence of two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." The contract out of which the claim in this case arose was in the name of the National Tool & Manufacturing Co., and this company performed such work as was performed before the contract was cancelled. Subsequent to said cancellation the said company changed its name to the Blue Bird Manufacturing Co. The Blue Bird Manufacturing Co. afterwards became insolvent and went into the hands of receivers, appointed by the Circuit Court of the City of St. Louis, Mo. Thereafter the Blue Bird Manufacturing Co. and the said receivers therefor entered into a contract with the Davis Sewing Machine Co. of Dayton, Ohio, subject to the approval of the said Circuit Court of the City of St. Louis, for the sale by the said Blue Bird Manufacturing Co. to the said Davis Sewing Machine Co. of all of the Blue Bird Manufacturing Co.'s assets, rights, privileges, and good will, for which payment was to be made to the Blue Bird Co.

in certain specified stock of a new Davis Sewing Machine Co., which the said Davis Sewing Machine Co., a corporation of the State of Ohio, was to cause to be incorporated under the laws of the State of Delaware, and to which new company the Davis Sewing Machine Co. of Ohio was to convey a great part of its assets and all of the assets of the Blue Bird Manufacturing Co. to be acquired by the said Davis Sewing Machine Co. of Ohio under said contract with said receivers and said Blue Bird Manufacturing Co. This contract was approved by the said court, and the receivers were ordered and directed by the court to carry it out. Thereupon the said new company, the Davis Sewing Machine Co. of Delaware, the plaintiff in this suit, was organized and incorporated, and the sale and transfer of the assets of the said Blue Bird Manufacturing Co. were made by said receivers and the said Blue Bird Manufacturing Co. to the Davis Sewing Machine Co. of Ohio, which in turn transferred said assets and a great part of its own assets to the plaintiff in this case, the Davis Sewing Machine Co. of Delaware, in accordance with the provisions of said contract and the order and direction of the court. At the time of said sale and transfer of assets of the Blue Bird Manufacturing Co. to the Davis Sewing Machine Co. of Ohio, and by that company to the Davis Sewing Machine Co. of Delaware, the claim which is the subject matter of this suit was a part of said assets.

The object of section 3477 was to protect the Government, not the claimant, and to prevent frauds on the Treasury. *Hobbs v. McLean*, 117 U. S. 567. The mischiefs designed to be remedied by the act were first, the danger that the rights of the Government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; second, by transfer of such claim against the Government to one or more persons not originally interested in it a way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts or the Congress, as desperate cases, when the reward is contingent on success, so often suggest. *Goodman v. Niblack*, 102 U. S. 556, 560. The statute does not apply to an assignment by an assignee in bankruptcy. *Burke v. United States*, 13 C. Cl. 231. A transfer of title to real property by virtue of the decree of a court carrying with it the right to rents accrued is not an assignment in violation of the statute. *Mills v. United States*, 19 C. Cl. 79. The transfer of a claim of an insolvent corporation against the United States to a receiver is by operation of law and not in violation of the statute. *Redfield v. United States*, 27 C. Cl. 393. The statute does not apply to claims title to which has been transferred by operation of law. *Erwin v. United States*, 97 U. S. 392, 397. The statute applies only to voluntary assignments of demands against the Government. *United States v. Gillis*, 95 U. S. 407, 416; *Price v. Forrest*, 173 U. S. 410, 421.

[fol. 51] In the instant case this transfer was made by order of the court which had appointed the receivers and having jurisdiction of the subject matter, and by the receivers, the representatives of the court, acting under its order. The claim clearly passed by action of

law and the assignment was not in violation of the statute. The plaintiff received its title from the receivers as the result of a judicial proceeding and an order of the court authorizing and directing them so to do.

Hay, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 52]

V. JUDGMENT

At a Court of Claims held in the City of Washington on the 26th day of January, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Fourteen thousand one hundred and ninety-two dollars and twenty-five cents (\$14,192.25).

By the Court.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On February 24, 1925, the plaintiff filed a motion for a new trial and amended findings of fact.

On March 2, 1925, the court entered the following order on said motion:

Order

It is ordered by the court this 2d day of March, 1925, that the plaintiff's motion for new trial be and the same is overruled.

VII. PETITION FOR APPEAL—Filed Mch. 16, 1925

Now comes the plaintiff and moves the Court to allow it an appeal to the Supreme Court of the United States from the judgment of the Court, entered January 26th, 1925, and the order denying a new trial for amended findings of fact, entered March 2nd, 1925, and that the Court direct the Clerk to include in the transcript of the record the plaintiff's motion and the grounds thereof for a new trial and amended findings of fact.

Respectfully submitted, Frumberg & Russell, Attorneys for Plaintiff.

VIII. ORDER ALLOWING APPEAL

It is ordered by the Court this 23d day of March, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 53] IN COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the history of proceedings; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Graham, J.; of the judgment of the court; of the proceedings after entry of judgment; of the plaintiff's application for appeal; of the order of court allowing plaintiff's application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 1st day of April, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 31,071. Court of Claims. Term No. 381. The Davis Sewing Machine Company of Delaware, appellant vs. The United States. Filed April 22nd, 1925. File No. 31,071.

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